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NOS. 85-1190 & 85-1207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ASSOCIATED GAS DISTRIBUTORS AND
PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

TRANSCONTINENTAL GAS PIPE LINE
CORPORATION, *ET AL.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

REPLY BRIEF OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

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TABLE OF AUTHORITIES

CASES — Page

Atlantic Refining Company v. Public Service Commission, 360 U.S. 378 (1959) 5

Pennzoil Company v. Federal Energy Regulatory Commission, 645 F.2d 350 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) 4

Public Service Commission v. Mid-Louisiana Gas Company, 463 U.S. 319 (1983) 3

STATUTES

Natural Gas Act, 15 U.S.C. §§ 717, *et seq.* (Supp. 1985) .. 5

Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. 1985) 2

NGPA § 101(b)(9), 15 U.S.C. § 3311(b) 4

NGPA § 110, 15 U.S.C. § 3320 5

NGPA § 504(a), 15 U.S.C. § 3414(a) 5

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REPLY BRIEF OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

Pursuant to Rule 22.5 of this Court, Transcontinental Gas Pipe Line Corporation, *et al.*, ("Petitioners") hereby reply to the Briefs in Opposition to the Petition for Writ of Certiorari in the above-captioned cases that were filed by the Federal Energy Regulatory Commission ("FERC") and certain producer intervenors ("Produc-

ers") on April 23, 1986. In their briefs in opposition, the FERC and the Producers each contend that Petitioners have mischaracterized the rationale underpinning the Declaratory Order here in issue (Pet. App. B, at 29a-50a) but even these parties disagree as to the basis for the Order.[1] Each party also contends that the Order is a proper interpretation of the Natural Gas Policy Act of 1978 ("NGPA"),[2] principally because it allegedly continues pre-NGPA regulatory practice.

1. Significantly, the FERC and the Producers do not dispute the importance of the issue decided in the Order. Even the court below recognized the importance of the issue, stating that the Order raised "the specter of opening a gaping loophole in the maximum lawful price provisions in the NGPA." (Pet. App. A, at 26a). The specter recognized by the court below is very real. Essentially, the Order is based on the FERC's perception that it is authorized to pick and choose among those elements of valuable consideration set forth in a contract that it will consider when applying Congressionally-established maximum lawful price ceilings. While the Order addresses only one type of consideration received by producers—*i.e.*, free or partially unreimbursed liquids and liquefiable transportation service—the principle involved could be equally applicable to *any* type of consideration provided for in gas purchase contracts. Thus, this case presents the fundamental and important ques-

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1. The FERC argues that the basis of the Order is to remove price uncertainty and avoid administrative difficulty. (FERC Br., at 6). On the other hand, the Producers argue that the basis of the Order is a distinction between the price of gas at the wellhead and consideration for services rendered beyond the wellhead. (Prod. Br., at 5-6).

2. 15 U.S.C. §§ 3301-3432 (Supp. 1985).

tion of how Congress intended its ceiling price structure to be enforced.[3]

2. The cornerstone of the FERC's and the producers' defense of the Order, and the principal basis for the rationale of the court below, is a cost allocation policy adopted by the FERC in pipeline rate cases which requires that pipelines absorb certain transportation costs not fully reimbursed by producer suppliers. That cost allocation policy[4] is totally irrelevant for purposes of ascertaining Congress' intent regarding the applicability of maximum lawful price ceilings because it has no bearing whatsoever on the price collected by producers under their contracts for the first sale of natural gas. Since Congressional ceiling price limitations apply only to the prices received by producers, the only pertinent question is whether admittedly valuable consideration in the form of free or discounted transportation services received by producers is part of the "first sale price" subject to Congressionally-established price ceilings. A cost allocation policy *used only in pipeline ratemaking* has no bearing on the relevant question and Congress would

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3. In Public Service Commission v. Mid-Louisiana Gas Company, 463 U.S. 319, 334 (1983), this Court held that the NGPA established a "precise schedule of price ceilings." The question of whether those precise ceiling prices are properly enforced in terms of only part, but not all, of the "first sale price" subject to regulation represents a question that will reoccur with respect to other types of non-monetary consideration set forth in gas purchase contracts.

4. FERC claims that its pipeline cost allocation policy predated enactment of the NGPA, which is inaccurate. That dispute is academic, however, because the policy has no bearing on producer prices. Significantly, the Commission can cite no case where a producer was affirmatively permitted to collect NGA ceiling prices as well as additional consideration in the form of free or partially unreimbursed transportation service.

not have relied on that policy in developing maximum lawful ceiling prices applicable to first sales of gas.

3. The FERC and the Producers argue that the Commission can adopt any reasonable interpretation of the meaning of "first sale price" because Congress was silent on its intent. However, Congress was *not* silent on the question of what constituted the "first sale price" subject to the regulatory ceiling prices established in Title I. Section 101(b)(9) of the NGPA[5] makes it clear that the "first sale price" was intended to be the contract price. Petitioners submit that it is totally unreasonable for the FERC to substitute its own notions of what constitutes "price" where Congress expressly indicated that the contract should control. By indicating that the contract would control the determination of the "first sale price" for gas, the only reasonable conclusion is that Congress intended that disputes with respect to what constitutes the "price" would be resolved in accordance with general principles of contract law, where price is all of the consideration received by a seller.[6] However, instead of relying on the generally accepted concepts of price in contract law, the Order announced a federal rule totally at odds with contract law principles. While the FERC attempts to justify this federal rule as providing for certainty in gas pricing and efficiency in administration, those justifications ignore the overriding question of whether *Congress* intended new rules of contract con-

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5. 15 U.S.C. § 3311(b)(9).

6. Indeed, in Pennzoil Company v. Federal Energy Regulatory Commission, 645 F.2d 350 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), the court expressly held that FERC use state rules of contract construction when determining the price allowed by gas purchase contracts.

struction to be imposed on pre-existing private contracts.[7]

4. The FERC and the Producers also argue that Congress could not have intended the agency to assign a value to every aspect of non-monetary consideration contained in gas purchase contracts when enforcing the NGPA's price ceilings.[8] This argument ignores the fact that this Court long ago admonished the FERC's predecessor agency to consider the value of unreimbursed transportation services when regulating producer rates pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.* (Supp. 1985).[9] There is absolutely no indication in the NGPA that Congress intended the NGPA's maximum lawful ceiling prices to be less comprehensive than the regulation previously applicable under the NGA. Section 504(a) of the NGPA,[10] states that it "shall be unlawful for any person . . . to sell natural gas at a first sale price in excess of any applicable maximum

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7. The FERC erroneously claims that Petitioners did not preserve this issue by presenting it below. As the FERC itself recognized, several rehearing petitions "couch the Title I question as involving contract law only." (Pet. App. C, at 56a). Obviously, the question of whether FERC was bound by general contract principles when interpreting a contract was preserved for review.

8. In Section 110 of the NGPA Congress expressly allowed recovery of production-related costs in addition to maximum lawful ceiling prices. The FERC undertook the complicated task of assigning values to production-related services where the producers would benefit. If Congress did not view administrative difficulty as bar to the FERC action in regard to additional compensation for producers, it would be equally true that Congress did not intend that administrative difficulty be invoked where the enforcement of price ceilings was at issue.

9. *Atlantic Refining Company v. Public Service Commission*, 360 U.S. 378 (1959).

10. 15 U.S.C. § 3414(a).

lawful price under this Act." This language gives no indication that an unlawful price may be forgiven, even if it is administratively difficult to determine the value to be assigned to non-monetary consideration.

Given the importance of the question presented and the significance of the resolution of this question to administration of the NGPA, the writ should be granted.

Respectfully submitted,

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